

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

MARIE DEAN, PERSONAL REPRESENTATIVE
OF THE ESTATES OF TALEIGHA MARIE DEAN,
DECEASED, AARON JOHN DEAN, DECEASED,
CRAIG LOGAN DEAN, DECEASED, AND EUGENE
SYLVESTER, DECEASED

Plaintiff-Appellee,

-vs-

JEFFREY CHILDS AND THE
CHARTER TOWNSHIP OF ROYAL OAK

Defendants-Appellants.

Supreme Court
Case No.: 126393

Supreme Court
Previous Case No.: 122171

Court of Appeals
Case No. 244627 (On Rem)

Court of Appeals
Previous Case No.: 240573

Oakland County Circuit Court
Case No.: 01-029844-NO

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**PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

PROOF OF SERVICE

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STATEMENT OF ORDER APPEALED FROM

Plaintiff-Appellee adopts the Defendant-Appellant's Statement of Order Appealed From with the exception that this case actually involves the imposition of liability on Royal Oak Township Firefighters for fatal injuries sustained as a result of their affirmative acts which directly caused the deaths of the minor Plaintiffs-Appellees.

Further, the Michigan Court of Appeals applied the correct standard and their Opinion dated May 13, 2004, is not inconsistent with Michigan Supreme Court Opinions in Robinson v City of Detroit, 462 Mich 439 (2000), Beaudrie v Henderson, 465 Mich 124 (2001) and Murdock v Higgins, 454 Mich 46 (1997).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

STATEMENT

- I. WHERE PLAINTIFF'S DECEDENTS DIED IN A HOUSE FIRE, THE EFFORTS TAKEN BY THE FIREFIGHTERS TO PUT OUT THE FIRE WAS NOT "THE PROXIMATE CAUSE" OF THEIR DEATHS AND DEFENDANT CHILDS WAS ENTITLED TO GOVERNMENTAL IMMUNITY UNDER MCLA 691.1407(2).....

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STATEMENT

- II. FIREFIGHTERS WHO ARE CALLED TO FIGHT FIRES DO NOT OWE ACTIONABLE DUTIES TO THOSE WHO MAY BE INJURED IN THE FIRE.....
- (A) The Public Duty Doctrine Should Apply to Firefighters Engaged in Fighting Fires.....
- (B) Under Common Law Tort Analysis, Firefighters Engaged in Fire Fighting Owe No Actionable Duty to Those Injured by the Fire.....

COUNTER STATEMENT

- II. FIREFIGHTER JEFFREY CHILDS DID OWE A DUTY TO PLAINTIFF AND HER DECEDENTS WHO WERE INJURED AND DIED IN THE FIRE.

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Plaintiff-Appellee adopts the Statement of Material Facts and Proceedings of Defendants-Appellants with the exception that this case is not premised on alleged inadequate efforts to extinguish the fire, as asserted by Defendants-Appellants. A gross negligence cause of action against the Defendant firefighter is premised on the firefighter's active conduct which occurred after the fire started and which caused the death of the Plaintiff's decedents.

STANDARD OF REVIEW

Plaintiff-Appellee adopts the Standard of Review as asserted by Defendant-Appellant.

LEGAL ARGUMENT

- I. WHERE PLAINTIFF'S DECEDENTS DIED IN A HOUSE FIRE, THE AFFIRMATIVE ACTIONS TAKEN BY THE FIREFIGHTER WAS THE ONE MOST IMMEDIATE, EFFICIENT, AND DIRECT CAUSE OF THE INJURY AND DEATHS OF PLAINTIFF'S DECEDENTS.

The only issue remaining in this case concerns the potential liability of Defendant Childs under state law. Further, Plaintiff - Appellee is not looking for this court to rule that the Defendant firefighter was the proximate cause of the decedents deaths. This court is only being asked to rule there is sufficient evidence to submit the issue of "the proximate cause" to the trier of fact. MCR 2.111(C)(7) and MCR 2.116(C)(8)

As to Defendant Childs, an officer or employee is not entitled to governmental immunity when his or her conduct constitutes gross negligence that is the proximate cause of the injury or damage. Id. Gross negligence is defined by statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Maiden v Rozwood 461 Mich 109, 122; 597 NW2d 817 (1999). Gross negligence is not being disputed by the Defendant and not at issue. Viewing the factual allegations as true and construing them in a light most favorable to Plaintiff, the claim that Defendant Childs' conduct was grossly negligent is not so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Knowing that children were trapped in the rear of the house which was on fire and knowing other firefighters were rescuing the children through the rear entrance of the house, Defendant Childs took action which caused the fire to spread into the rear area of the house where the children were located.

With respect to the causal connection between Defendant Childs actions and

Plaintiff's injuries, the Michigan Supreme Court in Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000), in interpreting "the proximate cause" held that "the legislature has provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause." Id. At 462.

As set forth in the Affidavit of Fireman Soave, the actions by Defendant Childs caused the fire in the front of the house to be pushed toward the rear of the house where Plaintiff's decedents were located, and the actions of Defendant Childs increased the danger to the Plaintiff's decedents and prevented Fireman Soave from rescuing the children. Viewing these facts in a light most favorable to Plaintiffs, Defendant Childs' affirmative actions preventing rescue and causing the deaths of the decedents, are the one most immediate, efficient and direct cause of the injury. Contrary to Defendants' assertions, for the purposes of a Motion for Summary Disposition, the fire was not the one most immediate, efficient and direct cause of the injury, since but for Defendant Childs' conduct, the children would have been saved. Defendant Childs' actions are the closest in time and proximity to the injury. Judge Griffin, in his dissent, incorrectly stated the affidavit of Firefighter Soave was speculation. Firefighter Soave based his affidavit on training and experience as a firefighter. Further, as noted in Defendant - Appellant's brief at footnote # 17, all allegations contained in Firefighter Soave's affidavit are assumed to be true.

In revisiting this issue of proximate cause, Defendant cites to an unpublished Michigan Court of Appeals case, Ortiz v Porter, CA# 226466 (11/30/01). First, this issue

has already been addressed by the trial court which held that “reasonable jurors could disagree as to the one most immediate, efficient, and direct cause of the children’s deaths.” Second, the decision in Ortiz does not support Defendant’s argument in the present case. The Ortiz case involved the failure to ensure the placement of a smoke detector inside a rental home, which subsequently caught fire causing plaintiff’s injuries. The Ortiz Court held that the fire was the one most immediate and direct cause of Plaintiff’s injuries. The facts in Ortiz are clearly distinguishable from the facts presented in the present case. As set forth in the Affidavit of Fireman Soave, the actions by Defendant Childs caused the fire in the front of the house to be pushed toward the rear of the house where Plaintiff’s decedents were located, and the actions of Defendant Childs caused the deaths of the Plaintiff’s decedents. Viewing these facts in a light most favorable to Plaintiff, Defendant Childs’ affirmative actions preventing rescue and increasing the danger to decedents, are the one most immediate, efficient and direct cause of the injury. Unlike the conduct in Ortiz, Defendant Childs’ actions are the closest in time and proximity to the injury. Furthermore, the Ortiz opinion is unpublished. “An unpublished opinion is not precedentially binding under the rule of stare decisis.” MCR 7.215 (C)(1); Braford v O’Connor Chiropractic Clinic, 243 Mich App 524, 624 NW2d 245 (2001). It is also apparent from the Ortiz opinion that the issue in that case was not raised by the parties or considered by the lower court. The Ortiz opinion does not support Defendant’s argument that this Court should grant Defendant’s Application for Leave to Appeal with respect to the issue of proximate causation.

It is also respectfully submitted Robinson v City of Detroit 462 Mich 439; 613 NW2d

307 (2000) supports Plaintiff's position in this case. Robinson held the collision involving the driver of a fleeing vehicle, which occurred after the decision to begin a high speed chase by police officers, was "the most immediate cause" of Plaintiff's injury. Defendant-Appellant, along with Judge Griffin also relied upon Kruger v White Lake Twp., 250 Mich App 622 (2002) for the proposition that the alleged gross negligence of the township police department was not the proximate cause of Plaintiff's decedent's death when the decedent was run over and killed by a motor vehicle after the decedent escaped from police custody. Based on the facts of Kruger the court of appeals came to the correct conclusion because the most immediate cause was the driver running over the decedent, not the failure of the police department to take appropriate actions prior to the accident. Based on the Robinson and Kruger analysis, the majority's opinion in the case at bar is consistent with prior Michigan precedent as set forth above.

Defendant - Appellant also cites Curtis v City of Flint, 253 Mich App 555; 655 NW2d 791 (2003) for the definition of "the most immediate cause." Curtis relies upon Robinson and again supports Plaintiff - Appellee's position in the case at bar. The Plaintiff in Curtis alleged the driver of a Flint paramedic unit was operating the vehicle in a grossly negligent manner and was liable to Plaintiff for injuries sustained in an accident when another vehicle collided with Plaintiff while he was stopped on the shoulder to allow the emergency vehicle to pass. As consistent with Robinson, the Curtis court held because the emergency vehicle was not involved with this accident("Resulting From") and occurred too remotely in time to the collision, the driving of the emergency vehicle was not the proximate cause. Again, this analysis is consistent with the Court of Appeals in the case at bar because Fire

Fighter Child's affirmative actions occurred after the fire started and based on Fire Fighter Soave's affidavit, the death of the children "resulted from" the actions of Defendant Childs.

Defendant-Appellant also relies upon this court's decision in Murdock v Higgins, 454 Mich 46 (1997) to support its proposition that Defendant Childs' gross negligence is not the proximate cause of Plaintiff's decedents injuries and deaths. Just as all other citations relied upon by the Defendant-Appellant, the Murdock case supports the Plaintiff-Appellee's position in this case. The Murdock case involved Plaintiff being sexually molested by a Department of Social Service employee and the Plaintiff subsequently brought a cause of action alleging gross negligence against the supervisor of the employee who molested the Plaintiff. The Plaintiff alleged that the supervisor was grossly negligent in hiring the employee who molested Plaintiff. The Court of Appeals held there was insufficient evidence to find that Defendant Higgins' conduct was the proximate cause of Plaintiff's injuries. This court affirmed the Court of Appeals on the issue of proximate cause because Defendant Higgins was not the supervisor of the employee who molested the Plaintiff at that time and therefore the one most and immediate cause of Plaintiff's injuries was the sexual assault by the employee. The analysis by this court in Murdock is consistent with this court's ruling in Robinson and Curtis.

It should be noted that all other cases relied on by Defendant - Appellant and attached to his brief are unpublished Court of Appeals decisions and not precedentially binding on this court.

Defendant - Appellant is also trying to convince this court that the common definition of "immediate" precludes Defendant Child's affirmative actions from being the proximate

cause of the decedents deaths. This is contrary to the definition as cited in Defendant - Appellant's brief. One definition is: "acting or being without the intervention of another object, cause or agency." Based on Fire Fighter Soave's affidavit, it was Child's actions after the fire occurred that caused the decedents' deaths. Under common usage of the term "immediate", Child's action is the proximate cause because there was no intervening object or cause after his actions in killing the children. Had Childs done nothing, the children would have lived.

II. FIREFIGHTER JEFFREY CHILDS DID OWE A DUTY TO PLAINTIFF AND HER DECEDENTS WHO WERE INJURED AND DIED IN THE FIRE.

Defendant also seek Application for Leave to Appeal on the allegation that the cause of action is precluded by the "public duty doctrine". First, and as recently set forth by this current court in Beaudrie v Henderson, 465 Mich 124 (2001) the public duty doctrine applies only to police officers. This case involved the Plaintiff alleging gross negligence against the City of Dearborn police dispatcher. The Plaintiff alleged the police dispatcher was grossly negligent and engaged in active misconduct when she failed to notify the police of the whereabouts of Plaintiff's assailant and acted in concert with the assailant's mother in withholding information from the police department. The defendant dispatcher filed a motion for summary disposition asking the court to dismiss the case against her due to the fact that the public duty doctrine shielded her from liability. The trial court denied defendant's motion, but the Court of Appeals reversed the trial court. The Michigan Supreme Court granted leave to consider whether the public duty doctrine should be extended to protect governmental employees other than police officers who are alleged to

have failed to provide protection from the criminal acts of third parties. The court held that the public duty doctrine does not apply to governmental employees other than police officers. Therefore, the court reversed the decision of the Court of Appeals and remanded the case to the trial court for further proceedings.

The Court of Appeals in the case at bar, including Judge Griffin, held the Public Duty Doctrine does not apply to Plaintiff's claim against Fire Fighter Childs. This is consistent with this court's prior precedent in Beaudrie. In this court's holding, it analyzed the seminal case on the Public Duty Doctrine, White v Beasley, 453 Mich 308 (1996). Even though Justice Cavanagh in the White court suggested that the public duty doctrine should also apply to firefighters, lifeguards, and similar governmental safety professionals, the Beaudrie court rejected that opinion. The Beaudrie court specifically held that further expansion of the public duty doctrine, other than to police officers, is unwarranted because the governmental immunity statute already provides government employees with significant protections from liability. The Beaudrie court held: "[A]pplication of the public duty doctrine is limited to cases like White involving an alleged failure of a police officer to protect a plaintiff from the criminal acts of a third party." Id. at 141.

Based upon the foregoing, it is clear that the public duty doctrine is abrogated except as to police officers. For purposes of determining the liability of public employees other than police officers, the Court will determine a government employee's duty using the same traditional common law duty analysis applicable to private individuals.

Defendant - Appellant is asking this court to read the word "police" and the phrase "police protection" to include firefighters. This is asking the court to interpret a clear and

unambiguous term in its unintended meaning. Further, this court has already rejected such inclusion in the term “police.” Judge Griffin, concurring with the majority that the Public Duty Doctrine does not apply to the case at bar, also held in Ortiz the Public Duty Doctrine does not apply to a city fire inspector.

Even if the public duty doctrine did apply, the Michigan Supreme Court in White v Beasley, 453 Mich 308; 552 NW2d 1 (1996), recently addressed the application of the public duty doctrine in Michigan. The lead opinion in White, citing Justice Cooley, summarized the public duty doctrine:

“[I]f the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages.” Id. At 316 (Quoting 2 Cooley, Torts (4th ed), sec 300, pp 385-386).

The Lead opinion in White adopted the public duty doctrine, concluding:

“The government should be protected from unreasonable interference with policy decisions. Government employees should enjoy personal protection from tort liability based on their action in conformity with, or failure to conform to, statutes or ordinances not intended to create tort liability. The job titles of government employees alone should not create a duty to specific members of the public.” Id. at 319.

The lead opinion went on to adopt an exception to the public-duty set forth in Cuffy v City of New York, 69 NY2d 255; 513 NYS2d 372; 5505 NE 2d 937 (1987), which provided the elements for the special relationship test as:

- (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured.
- (2) knowledge on the part of the municipality’s agent that inaction could lead

to harm;

(3) some form of direct contact between the municipality's agent and the injured party; and

(4) that party's justifiable reliance on the Municipality's affirmative undertaking (Cuffy, 69 NY2d 260).

However, the separate concurring opinion of Justice Boyle in White specifically held that the public duty doctrine insulates officers from tort liability for the **negligent failure** to provide police protection unless an individual plaintiff satisfies the special relationship exception. Likewise Justice Cavanagh's opinion, concurring in part and dissenting in part, specifically limited "the scope of this opinion to only those cases in which liability is alleged on the basis of the police officer's failure to protect an individual from the actions of a third party. This case should have no bearing in a case involving an injury caused by the police officer's own actions." White at 330. Since the lead opinion was signed by only three justices, the majority of the court agreed, in conformity with the concurring opinions, to the proposition that the public duty doctrine is applicable only in cases involving governmental inaction or omissions as opposed to affirmative acts.

As applied to the present case, the public duty doctrine does not bar Plaintiff's cause of action. First, as set forth by a majority of the Michigan Supreme Court Justices in White, the doctrine applies to governmental agents' failure to act or omissions to perform their duties. In the present case, Plaintiff's cause of action is premised on Defendant Childs' affirmative acts of gross negligence. Defendant Childs, knowing that there were children in the rear of the burning building, intentionally ordered that the fire hoses be directed onto the fire from the front of the building, thereby pushing flames and smoke

towards the direction of the trapped children and frustrating attempts to save the children from the back of the house. This is not a case involving Defendant's inaction or nonfeasance. Defendant's actions exacerbated the existing problem by compounding the danger and hampering and impeding the rescue attempts.

Second, even if Defendant Childs' actions fall within the general public duty doctrine, Plaintiff's cause of action falls squarely within the exception to the public duty doctrine recognized in White. As specifically delineated within Plaintiff's Complaint, when the fire department first arrived on the scene, members of the fire department undertook to combat the fire and made direct contact with the decedents' mother, at which time firemen made assertions that they would act to save the trapped children. These facts support the elements of the Cuffy test. Through both their promises to act to save the children and their actions to deal with the fire, the fire department, specifically Defendant Childs, assumed an affirmative duty to act on behalf of the children. Knowledge that the children were trapped inside of the home establishes that their actions could lead to harm. There was direct contact between the municipality's agents and the decedents' mother. Finally, the parties justifiably relied on the Defendants' affirmative undertaking. Given the assertions by firemen on the scene, Plaintiffs justifiably relied on their actions and were justified in assuming that the firemen's conduct would not exacerbate the danger to the children in the rear of the burning building or prevent rescue attempts.

Defendants would argue that there could be no justifiable reliance on the firefighters' conduct, citing the White decision. However, the White case involved no direct contact between Plaintiff and Defendants and therefore no knowledge of a promise on which

Plaintiff could rely. Contrary to Defendants' assertions, Plaintiffs are not relying on the basis of defendant's job titles. Unlike White, Plaintiffs had direct contact with the fire department and relied on specific promises, guarantees and actions.

The public duty doctrine as set forth by the majority in White does not apply to the present case because it involves the affirmative acts of Defendant Childs, not inaction or nonfeasance. Even if the doctrine were to apply, Plaintiffs have pled sufficient facts to establish the special relationship exception as set forth in Cuffy.

Plaintiff's cause of action is premised on Defendant Childs' affirmative direct acts that caused the fire and smoke to be pushed toward the trapped children and prevented their rescue. Under State law, Plaintiffs' cause of action establishes a duty and special relationship between Defendant Childs and Plaintiffs for which Defendant Childs is not shielded by governmental immunity, since his conduct constituted gross negligence which was the proximate cause of Plaintiffs' injuries.

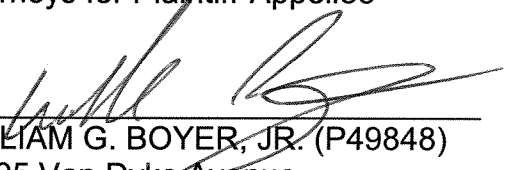
RELIEF REQUESTED

Plaintiff-Appellee respectfully requests that this Court deny Defendant-Appellant's Application for Leave to Appeal.

Dated: July 19, 2004

Respectfully Submitted,

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